UNITED STATES OF AMERICA 105 FERC ¶ 61,182
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Public Utilities Commission of the State of California

v. Docket Nos. EL02-60-000, EL02-60-003 and EL02-60-004

Sellers of Long Term Contracts to the California Department of Water Resources

California Electricity Oversight Board

v. Docket Nos. EL02-62-000, EL02-62-003 and EL02-62-004

Sellers of Energy and Capacity Under Long-Term Contracts with the California Department of Water Resources (Consolidated)

ORDER ON REHEARING AND CLARIFICATION

(Issued November 10, 2003)

1. On February 25, 2002, the Public Utilities Commission of the State of California (CPUC) and the California Electricity Oversight Board (CEOB) (collectively, "Complainants") filed complaints seeking to modify certain long-term contracts entered into between the California Department of Water Resources (CDWR) and more than twenty-four (24) sellers.[1] As a result of withdrawals and dismissals, only four sellers

[1] See Public Utilities Commission of California v. Sellers of Long Term Contracts, 103 FERC ¶ 61,354 n.21 (June 26 Order).

remain in this proceeding.[2] They are Mirant America Energy Marketing, LP (Mirant); Coral Power, L.L.C. (Coral); Dynegy Power Marketing, Inc. (Dynegy); and Sempra Energy Resources (Sempra). The complaints allege that the prices, terms and conditions of the contracts are unjust and unreasonable and, to the extent applicable, not in the public interest, and that the respondents obtained the prices, terms and conditions in the contracts through the exercise of market power in violation of the Federal Power Act (FPA).

2. On June 26, 2003, we denied the complaints.[3] In this Order, we deny the requests for rehearing, reaffirm our conclusion that the record in this proceeding does not support modification of the contracts at issue for the reasons stated below, and address the request for clarification. This Order is in the public interest because it balances effective rate

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[2] Id. We also granted withdrawal of the complaints as to Allegheny Energy Supply Company, LLC (Allegheny) on July 11, 2003. Public Utilities Commission of California v. Sellers of Long Term Contracts, 104 FERC ¶ 61,074 (2003).

On August 6, 2003, Complainants moved to dismiss with prejudice their complaints against El Paso Merchant Energy, L.P. (El Paso) as Complainants and El Paso have reached a comprehensive settlement (Master Settlement Agreement) resolving Complainants' claims against El Paso in this proceeding. Complainants further request that the dismissal be void ab initio if the Effective Date under the Master Settlement Agreement never occurs. We grant Complainants' motion and dismiss their complaints as to El Paso with prejudice. See also Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216 (2003). This dismissal will be void ab initio if the Effective Date under the Master Settlement Agreement never occurs.

On September 25, 2003, Complainants moved to withdraw with prejudice their complaints as to Morgan Stanley Capital Group, Inc. Consistent with Rule 216 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216 (2003), the withdrawal has become effective by operation of law.

On April 25, 2002, we dismissed the complaints as to contracts entered into after June 20, 2001. Public Utilities Commission of California v. Sellers of Long Term Contracts, 99 FERC ¶ 61,087 at 61,383-84 (April 25 Order), order on reh'g, 100 FERC ¶ 61,098 (2002) (July 23 Order).

[3] June 26 Order, 103 FERC ¶ 61,354.

regulation with respect for the sanctity of contracts, as dictated by the U.S. Supreme Court under the Mobile-Sierra[4] doctrine.

I. Background

3. In the April 25 Order, we found that the Mirant and Coral contracts contained explicit provisions limiting the contracting parties' rights to make unilateral FPA Section 205 or Section 206 filings, as well as the FPA Section 206 rights of third parties, to amend the contract, and, therefore, Complainants would have to satisfy the public interest standard of review set out in Mobile-Sierra to justify the requested contract modification.[5]

4. As for the contracts that did not contain explicit Mobile-Sierra provisions (the Dynegy and Sempra contracts), we found the record was insufficient to determine whether Complainants would face a Mobile-Sierra burden of proof or the FPA Section 206 just and reasonable burden of proof to justify modification.[6] Thus, we "set for hearing the issue of whether the complainants must bear the burden of showing that [the Dynegy or Sempra] contract[s] [are] contrary to the public interest, or whether they will bear the burden of showing that the contract[s] [are] not just and reasonable."[7]

5. We also set for hearing, as to the Mirant, Coral, Dynegy, and Sempra contracts, the limited issue of "whether the dysfunctional California spot markets adversely affected the long-term bilateral markets, and, if so, whether modification of any individual contract at issue is warranted."[8] If the Administrative Law Judge (ALJ) were to conclude that modification of one or more of the contracts was warranted, she was not to determine how those contracts should be modified.[9] "The evidentiary hearing was established to,

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[4]United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) (Mobile); FPC v. Sierra Pacific Power, 350 U.S. 348 (1956) (Sierra).

[5]April 25 Order, 99 FERC at 61,383.

[6]Id.

[7]Id.

[8]Id. at 61,384 (footnote omitted).

[9]Id.

among other things, interpret the terms of [the contracts at issue] and to ascertain the intent of the parties at the time these contracts were signed."[10]

6. On December 17, 2002, we directed the ALJ to omit the initial decision as to contracts containing explicit Mobile-Sierra provisions and to certify the record as to those contracts directly to the Commission.[11] Then, on January 10, 2003, we again instructed the ALJ to "determin[e] which standard of review applies to the contracts not containing explicit Mobile-Sierra language" and clarified that:

> [a]s to the contracts for which the Presiding ALJ finds the applicable standard of review to be the 'just and reasonable' standard, the ALJ should then address the question of whether the 'just and reasonable' standard has been met. As to the contracts for which the Presiding ALJ determines that the applicable standard of review is the 'public interest' standard, the ALJ should certify the record directly to the Commission. The Commission will then determine whether the 'public interest' standard has been met.[12]

7. On January 16, 2003, after holding an evidentiary hearing held on December 2-12, 2002, the ALJ issued an initial decision on the limited burden of proof/standard of review issue we directed and certified the record to us for determination of all remaining issues.[13] The ALJ found that each contract's language and the evidence presented at the hearing persuasively demonstrated that the contracting parties did not, nor did they intend

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[10]July 23 Order at 61,393.

[11]Public Utilities Commission of California v. Sellers of Long Term Contracts, 101 FERC ¶ 61,293 (2002).

[12]Public Utilities Commission of California v. Sellers of Long Term Contracts, 102 FERC ¶ 61,025 at P 13 (2003).

[13]Public Utilities Commission of California v. Sellers of Long Term Contracts, 102 FERC ¶ 63,013 (2003) (Partial Initial Decision).

to, preserve their rights to make unilateral application to the Commission for modification of the contracts.[14]

Dynegy Contract

8. The ALJ explained that, while the Dynegy contract did not contain a provision specifically addressing the parties' FPA Section 205 or Section 206 rights, a provision in a subpart of the contract (Section 8, paragraph F of the System Contingent Capacity Purchase and Sales Agreement) "appears to limit CDWR's right to take any action which is inconsistent with the just and reasonable nature of the rates . . ."[15] That section provides that:

> CDWR acknowledges and agrees that all payments to [Dynegy] hereunder, . . . are 'just and reasonable' within the meaning of Section 451 of the Public Utilities Code and that CDWR shall not take any action or fail to take any action which is inconsistent with the just and reasonable nature of such payments.[16]

9. The ALJ also noted witness testimony that "Dynegy insisted on this provision, otherwise Dynegy would not have had any assurance of payment and no assurance that CDWR would not later seek to devise a way to abrogate the contract."[17] That same witness asserted that "any argument advanced by, or on behalf of CDWR, that the FERC

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[14] Id. at P 43 (citing, e.g., Exh. SER-1 at 34:6-26, 34:10-26 (Niggli); Exh. SER-32 at 6:17-28 (Niggli); Exh. DYN-1 at 33:10-34:5 (Lednicky)); id. at P 45. The ALJ noted that "the extrinsic evidence of record indicate[d] that the State had very little confidence in the Commission as an avenue for relief at the time these contracts were negotiated, that CDWR negotiated the subject contracts in a 'crisis' environment, and that for various reasons CDWR's negotiating team focused almost exclusively on the pricing terms of the subject contracts. In fact, at least one witness testified that precluding unilateral application to the Commission for changes in rates, terms and conditions was an issue of importance to CDWR and that the parties agreed to language to this effect in their executed contract." Id. at P 43.

[15] Id. at P 37.

[16] Id. (quoting Exh. DYN-2 at EOB-DYN-1-0005286).

[17] Id. (citing Exh. DYN-1 at 33:6-9).

can or should review and determine whether the Agreement, or payments under the Agreement are 'just and reasonable' is the taking of an action 'inconsistent with the just and reasonable nature of the payments' and is expressly prohibited by the Agreement."[18]

10. Although acknowledging that "this Commission's determination regarding whether a rate is just and reasonable is not governed by Section 451 of the Public Utilities Code," the ALJ found that Section 8, paragraph F of the System Contingent Capacity Purchase and Sales Agreement:

> suggest[s] that the parties agreed that they would not take any action which is inconsistent with the presumed just and reasonable nature of the rates in this contract. Accordingly, and because the contract is otherwise silent with respect to the parties' Sections 205 and 206 rights, . . . the Mobile-Sierra 'public interest' standard should be applied in this instance.[19]

Sempra Contract

11. The ALJ found that one provision in the Sempra contract addresses the parties' rights under FPA Sections 205 and 206:[20]

> FERC. The Parties acknowledge that (i) this agreement provides for wholesale power sales subject to the jurisdiction of the FERC under the FPA; and (ii) the rates, terms and conditions of this Agreement are 'just' and 'reasonable' within the meaning of the FPA and that changes in market conditions will not render such rates, terms and conditions 'unjust' or 'unreasonable' for purposes of Section 206 of the FPA.[21]

12. The ALJ further noted the explanation of Sempra's witness that, initially, Sempra proposed contract language that would give both CDWR and Sempra the unilateral right to seek contract modification, but, because CDWR did not want FERC to have the ability to review the rates, terms and conditions of the contract, they agreed to alter the contract

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[18] Id. (quoting Exh. DYN-1 at 33:15-34:5).

[19] Id. at P 38 (citing Exh. S-4 at 10:15-12:10); see id. at P 43.

[20] Id. at P 41 (citing Section 10.03 of the Energy Purchase Agreement).

[21] Id.

to limit the unilateral right of either Sempra or CDWR to modify the contract's rates, terms or conditions of service.[22] Based on the contract language quoted above and the cited witness testimony, the ALJ concluded that the Mobile-Sierra public interest standard applies to the Sempra contract.[23]

13. In addition, the ALJ noted Complainants' concession that they:

> have not argued, or submitted evidence, to the effect that the absence of an explicit Mobile-Sierra provision in the [Dynegy and Sempra] contracts is itself a basis for not applying the Mobile-Sierra standard to those contracts. Accordingly, to the extent the Mobile-Sierra standard applies to the contracts with explicit Mobile-Sierra provisions, it applies to the contracts without such provisions.[24]

14. The ALJ further explained the basis of her determination that unilaterally proposed changes to the Dynegy and Sempra contracts are subject to review under the Mobile-Sierra public interest standard.[25]

> As here, where the contract has not preserved the rights of a party to seek unilateral modifications, the finding that the Mobile-Sierra standard of review applies to a negotiated contract unless the contract expressly states otherwise serves to protect the expectations of contracting parties that their negotiated agreement will be respected, thus promoting stability of contracts, stability of the market as a whole, and protecting ratepayers by encouraging the utilization of contracts to reduce reliance on the more costly and volatile spot market, while still protecting the 'public interest' as

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[22] Id. at P 42 (citing Exh. SER-1 at 34:10-26).

[23] Id. at P 42 (citing Exh. S-4 at 15:14), P 43, P 45.

[24] Id. at P 44 (quoting Complainants' January 14, 2003 Answer to Motion to Hold Briefing in Abeyance).

[25] Id. at P 43.

required by the remedial protections afforded to consumers under the FPA.[26]

15. The parties submitted initial trial and reply briefs as well as briefs on exceptions to the Initial Decision and oppositions thereto. Also, on May 15, 2003, we held oral argument.

16. On June 26, 2003, we affirmed the ALJ's finding that the public interest standard of review applies to all the contracts at issue without explicit Mobile-Sierra language.[27] In doing so, we explained the genesis and parameters of the Mobile-Sierra doctrine, its public interest standard, and their impact on our review of requests for contract modification.[28] As we explained, the Mobile-Sierra cases and their progeny hold that, where parties contract for a particular rate and do not reserve their rights to unilaterally propose a rate change, a party cannot unilaterally file for a new rate and the Commission cannot act under the FPA just and reasonable standard to supersede the contractually agreed-upon rate.[29] Rather, we can grant a unilateral request to alter a contract under which the requesting party did not reserve its rights to unilaterally propose a rate change only if the proposed change is required by the "public interest."

17. We also denied the complaints, finding that Complainants did not meet their burden of proof under the public interest standard to justify modifying any of the contracts still at issue in this proceeding.[30] Based upon our review of the evidentiary record developed in this proceeding, the findings of the Commission Staff's Final Report on Price Manipulation in Western Markets in Docket No. PA02-2-000 (Staff Report), evidence submitted in the 100-Day Discovery Proceeding in Docket No. EL00-95, et al., and the totality of the circumstances, we concluded that the Complainants failed to meet

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[26] Id. at P 45 (citing Texaco Inc. v. FERC, 148 F.3d 1091, 1095 (D.C. Cir. 1998) (Texaco); Town of Norwood v. FERC, 202 F.3d 392, 400 (1st Cir. 2000); Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 953 (D.C. Cir. 1983) (Papago)).

[27] June 26 Order, 103 FERC at P 3.

[28] Id. at P 4-7.

[29] Id. at P 4 (citing Boston Edison Co. v. FERC, 233 F.3d 60, 64-65 (1st. Cir. 2000)).

[30] Id. at P 3.

their burden of proof under the public interest standard of review.[31] As Complainants devoted most of the evidentiary hearing and briefing to attempting to demonstrate that the contracts were unjust and unreasonable, we found that they presented very little evidence relevant to the Mobile-Sierra public interest standard that applies here.[32] We also found that the Complainants failed to demonstrate that the contracts in question caused financial distress for the Complainants (or others they represent), threatening their ability to continue service; that the contracts cast an excessive burden on customers; that the contracts were unduly discriminatory; or any other factors showing that modifying the contracts is required by the public interest.[33]

18. For example, we found that, through these contracts, CDWR achieved one of its central objectives of having a portfolio that yields a weighted average price no higher than $70/MWh, the average cost of energy supply reflected in IOUs' retail rates, as of January 2001.[34] In securing its contracts, CDWR also achieved an overall portfolio that is diversified both in terms of energy products and durations.[35] Furthermore, the evidence did not show that the contracts were priced above long-run competitive prices.[36] Nor did Complainants present evidence to support a finding that the contracts are unduly discriminatory or preferential to the detriment of other purchasers who are not parties to the contract.[37]

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[31] Id. at P 3, 8.

[32] Id. at P 39.

[33] Id. at P 8, 39.

[34] Id. at P 40 (citing Exh. CAL-51 at 10:24-11:3; Exh. AYE/SER-7 at 70:22-71:4 (Hart deposition); Exh. AYE/SER-11 at 64:11-66:2 (Nichols deposition); Tr. at 1258:14-1260:9; Exh. S-8 at 16:2-23; Exh. CAL-70 at 13 of Update of California Department of Water Resources Power Purchase Contract Efforts dated May 31, 2001 (May 31, 2001 CDWR Update); Exh. CAL-51 at 31:16-19; Exh. DYN-1 at 16:25-27).

[35] Id. (citing Exh. DYN-38 at 1).

[36] Id. (citing Exh. MAEM-25 at 6:20-9:22; Exh. COR-48; Exh. COR-50; Exh. CAL-163 at 1:22-2:7).

[37] Id. at P 41 (citing Papago, 723 F.2d at 953 n.4).

19. We further found that the extensive evidentiary record regarding the totality of circumstances preceding and following the execution of the contracts at issue shows that CDWR had options and at least some bargaining power when it entered into this portfolio of contracts after often protracted negotiations.[38] When the contracts were executed, alternatives were available; the parties voluntarily chose to enter into the contracts, accepting market risks.[39]

20. Additionally, we found nothing in the record, in the Staff Report, or in the 100-Day Discovery Proceeding evidence to support a finding that there was market manipulation specific to the long-term contract negotiations resulting in the prices and terms challenged here.[40] There was no evidence to support a finding of unfairness, bad faith, or duress in the original negotiations.[41] That left dissatisfaction with the bargain as the only basis for contract modification, an insufficient basis under the public interest standard.[42]

21. Requests for rehearing were filed by Public Utility District No. 1 of Snohomish County, Washington (Snohomish), Californians for Renewable Energy (CARE), jointly by Complainants, and jointly by Coral, Dynegy, Mirant and Sempra (Indicated Sellers). Sempra filed an answer to Complainants' request for rehearing, and Complainants filed an answer in response.

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[38] Id. at P 42-60 (citing numerous record exhibits).

[39] Id. at P 8.

[40] Id. at P 61.

[41] Id. at P 62.

[42] Id. at P 8, 62 (citing Potomac Electric Power Company v. FERC, 210 F.3d 403, 409 (D.C. Cir. 2000) (PEPCO); Soyland Power Cooperative, Inc. v. Central Illinois Public Service Company, 51 FERC & 61,004 at 61,013, reh'g dismissed as moot, 52 FERC & 61,149 (1990); Papago, 723 F.2d at 953; Sierra, 350 U.S. at 354-355).

II. Discussion

A. Procedural Matters

1. Ex Parte Allegations

22. Complainants request that we vacate the June 26 Order and that Chairman Wood and Commissioner Brownell recuse themselves from further proceedings in this matter because, after a Commission open meeting and press conference, Chairman Wood and Commissioner Brownell briefed a group of Wall Street analysts, via a telephone conference, about the open meeting.[43] We deny Complainants' requests.

23. We incorporate and reiterate our finding in an order issued in Docket No. EL02-28 on April 23, 2003,[44] and in an order denying rehearing in that same docket issued contemporaneously with this Order,[45] that the telephone conference briefing, in which the Chairman and Commissioner Brownell simply repeated what they already had discussed at the open meeting and provided general background information, was not an inappropriate ex parte communication and did not taint this proceeding.[46] Complainants' proffered statements from the Special Inquiry findings do not change this conclusion. In fact, those findings "did not identify evidence, based on that available record, substantiating the allegation that the conduct of the call violated any Commission procedural rule" and explained that "[n]one of [the 17 Wall Street representatives from 12 companies interviewed, nine of whom acknowledged participating in some or all of the conference call] stated that Chairman Wood or Commissioner Brownell explicitly indicated, during the conference call, how they would vote on the contract cases."[47]

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[43]Complainants' Reh'g Request at 2, 73-75 (citing Special Inquiry findings issued by the U.S. Department of Energy Office of the Inspector General on June 27, 2003 (Special Inquiry findings)).

[44]Nevada Power Co. and Sierra Pacific Power Co. v. Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,080 (2003).

[45]Nevada Power Co. and Sierra Pacific Power Co. v. Enron Power Marketing, Inc., et al., Docket No. EL02-28-004, et al.

[46]Nevada Power Company, et al., v. Enron Power Marketing, Inc., et al., 103 FERC ¶ 61,080 (2003).

[47]Special Inquiry findings, DOE/IG – 0610 June 2003, Results of the Inquiry p. 3.

24. Neither the Chairman nor Commissioner Brownell has prejudged the issues here, and, contrary to Complainants' assertion,[48] neither has had any "ex parte commitments." Vacation of the June 26 Order and recusal of the Chairman and Commissioner Brownell are therefore neither necessary nor appropriate in this case. We also reiterate our finding in the June 26 Order, at Appendix B, that Complainants' motion for disclosure of the telephone conference briefing is moot, as a summary of events relating to that briefing was filed in the record on April 22, 2003.

25. Even assuming the conference call was a prohibited off-the-record communication, the violation has already been remedied, as disclosure, not recusal, is the appropriate remedy. Administrative proceedings blemished by ex parte communications may be remedied administratively by disclosing the communication and its contents.[49] In this regard, in the context of a Commission case, the court found that, by placing summaries of meetings Commission officials held with industry officials, other parties were apprised "of any argument that may have been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused."[50]

26. In addition, in Louisiana, the court made clear that recusal was not necessary or desirable even though there may have been ex parte communications.[51] Recusal here, therefore, would be an extraordinary and unwarranted remedy.[52] In Power Authority of the State of New York, the court explained that:

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[48]Complainants' Reh'g Request at 2.

[49]See 5 U.S.C. § 557(d)(1)(C)&(D); Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 565 n.36 (1982).

[50]Louisiana Ass'n of Indep. Producers v. FERC, 958 F.2d 1101, 1112 (D.C. Cir. 1992).

[51]Id. (citing FTC v. Cement Inst., 333 U.S. 683, 702 (1948) ("It is expected that administrative official will build up expertise through experience with recurring issues.") and Laird v. Tatum, 409 U.S. 824, 837 (1972) ("Such expertise should not lightly be tossed aside.")).

[52]See Power Authority of the State of New York v. FERC, 743 F.2d 93, 110 (2d Cir. 1984) ("The mere existence of such communications hardly requires a court or administrative body to disqualify itself.").

> recusal would be required only if the communications posed a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it. In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut.[53]

27. As described above, the conference call contained no factual matter or other information outside the record, and, even assuming it did, Complainants had ample chance to rebut it at the oral argument or by filing a response.

2. Mirant Bankruptcy

28. On September 12, 2003, the Bankruptcy Court for the Northern District of Texas issued a "Temporary Restraining Order Against the Federal Energy Regulatory Commission" (TRO) in In re Mirant Corp. (Mirant Corp. v. FERC), Adversary Proceeding No. 03-4355, which enjoins the Commission "from taking any action, directly or indirectly, to require or coerce the [Mirant] Debtors to abide by the terms of any Wholesale Contract [to which a Mirant Debtor is a party] which Debtors are substantially performing or which Debtors are not performing pursuant to an order of the court unless FERC shall have provided the Debtors with ten (10) days' written notice setting forth in detail the action which FERC seeks to take with respect to any Wholesale Contract which is the subject of this paragraph."

29. Should the TRO be converted into a preliminary injunction, an action that the Commission opposes, the Commission will appeal that order. Despite the Commission's disagreement with the validity of the TRO and its expectation that the TRO (or a preliminary injunction) will be vacated on appeal, the Commission must comply with it until vacated. The TRO requires ten days' written notice before the Commission takes a proscribed action with respect to a covered Mirant Wholesale Contract. Accordingly, to the extent that this Order requires Mirant to act in a manner proscribed by the TRO, the Order will provide written notice to Mirant of the action that FERC will take with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten (10) days after issuance of this Order. In all other respects, this Order is effective immediately.

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[53] Id.

3. Other Procedural Matters

30. On July 26, 2003, as amended on September 2, 2003 and September 5, 2003, CARE filed a request for rehearing in this proceeding. As CARE acknowledged, it is not a party in this proceeding,[54] and it has not sought to intervene. As requests for rehearing can only be filed by parties,[55] we will dismiss CARE's request for rehearing.

31. Rule 713(d) of the Commission's Rules of Practice and Procedures, 18 C.F.R § 385.713(d) (2003), prohibits answers to requests for rehearing. Accordingly, we will reject Sempra's motion for leave to file a limited answer to Complainants' request for rehearing. Under Rule 213(a) of the Commission's Rules of Practice and Procedure, 18 C.F.R. ' 385.213(2003), no answer may be made to a protest or answer unless otherwise ordered by the decisional authority. Good cause does not exist to justify accepting Complainants' answer to Sempra's motion to file a limited answer; therefore, we will reject this answer.

B. Substantive Issues

1. Whether The Public Interest Standard Applies.

32. Complainants and Snohomish argue that, in the June 26 Order, the Commission violated its statutory obligation to ensure just and reasonable rates when it determined that it could impose a higher burden of proof before mitigating unjust and unreasonable prices in the contracts at issue. They state that the Commission can apply the public interest standard to determine whether prices should be mitigated only after its finds that the contract prices at issue here are just and reasonable.

33. As discussed below, the Commission has not violated its statutory obligation with respect to modification of contracts, as interpreted by the U.S. Supreme Court. The Mobile-Sierra doctrine holds that in cases "where parties have negotiated a … contract that sets firm prices … and that denies either party the right to change such prices [] unilaterally, [the Commission] may abrogate or modify the contract only if the public interest so requires."[56] Under the public interest standard, the sole concern of the

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[54] CARE Reh'g Request at n.6.

[55] See 18 C.F.R. § 385.713(b) (2003).

[56] Texaco, 148 F.3d at 1095.

Commission is whether the challenged rate adversely affects the public interest,[57] and the Commission can exercise its authority to modify contracts only where the public interest demands such action.[58] The burden to demonstrate that the contract rates in question in this proceeding are contrary to the public interest is on the Complainants. The Complainants in this proceeding, however, have failed to make such a showing. As established in the June 26 Order and affirmed in this order on rehearing, the contracts at issue are subject to the public interest standard of review. Once a party signs a Mobile-Sierra contract, it cannot escape by later claiming that the rates were not just and reasonable when it signed the contract, unless there is evidence such as the seller fraudulently inducing the buyer to execute the contract. However, no such evidence was found in the evidentiary record, including the Staff Report and the 100-Day Discovery Proceeding submittals.

34. In response to the Complainants' arguments that the Commission can apply the public interest standard of review only after it finds that the contract rates were just and reasonable,[59] Complainants fail to acknowledge that the contracts were lawfully entered into pursuant to prior findings and authorization by the Commission under Section 205 of the FPA.[60] Upon a showing that the seller lacks or has mitigated market power in the relevant market, the Commission pre-determines under Section 205 of the FPA that sales at market-based rates will be just and reasonable.[61] In effect, the Commission makes a "blanket" just and reasonable determination which applies to subsequent market-based sales made by the seller. As we explained in our June 26 Order, if we were required to examine every long-term service agreement as if the seller was seeking new market-based rate authority, it would make the original grant of authority a pointless exercise of no value to anyone.

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[57] Sierra, 350 U.S. at 354-5.

[58] Union Pacific Fuels, Inc., 129 F.3d 157, 161 (D.C. Cir. 1997) (quoting Metropolitan Edison Co. v. FERC, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979)).

[59] See also Snohomish Reh'g Request at 11, 12, 14-15, 18-22, 35.

[60] 16 U.S.C. § 824d (2000).

[61] Louisiana Power Authority v. FERC, 141 F.3d 364, 365 (D.C. Cir. 1998); Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993).

35. The Commission has held that this grant of market-based rate authority constitutes what is known as the "initial review" of rates in the cost-based rate context. Then, if the parties have not agreed to apply the public interest standard to future challenges, a party may come to the Commission pursuant to Section 206 of the FPA[62] and demonstrate that the rate is no longer just and reasonable. Alternatively, a party who does not have such a right may seek changes by demonstrating that the contract rate is contrary to the public interest. In essence, the Complainants and Snohomish attempt to add another layer to this two-step process, claiming that parties to contracts that are subject to the public interest standard of review should have another opportunity to argue that the rate was not just and reasonable at the outset. This argument, however, has no support in either the statute or the relevant Commission or court precedent. Indeed, the Complainants' suggested approach would create uncertainty in the market, as a party who suddenly finds that its deal has become uneconomical, can undo the terms to which it was contractually bound. This is precisely what the Mobile-Sierra doctrine was designed to avoid, and we see no support for an exception to this established doctrine simply because a party has contracted in a market-based rate regime.

36. Our decision in Lockyer[63] supports this result. The "view that only cost-based or formula rate models satisfy the statutory framework fundamentally misapprehends the Commission's ratemaking authority."[64] Lockyer held that market-based rate certificates satisfy the FPA Section 205(c)[65] requirement that rates be on file with the Commission and recognized that the Commission reviews the reasonableness of the use of market-based rates prior to their effectiveness. "Prior review consists, however, not of the particular prices agreed to by willing buyers and sellers. Rather, it consists of analysis to assure that the seller lacks or has mitigated market power so that its prices will fall within a zone of reasonableness."[66]

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[62] 16 U.S.C. § 824e (2000).

[63] State of California ex re Lockyer v. British Columbia Power Exchange Corp;, et al., 99 FERC ¶ 61,247 (2002) (Lockyer).

[64] Id. at 62,062.

[65] 16 U.S.C. § 824d(c) (2000).

[66] Lockyer, 99 FERC at 62,063.

37. Thus, at the time sellers are granted market-based rate certificates, their rates are subject to the initial review required by the FPA. This review is different than that conducted for cost-based rates because "[t]he availability of genuine alternatives provides a sufficient basis . . . to conclude that 'market discipline' will be sufficient to keep the prices that sellers charge within the statutorily-prescribed just and reasonable zone."[67] We reject the parties' argument that this approach is insufficient to satisfy the statute. Our decision in Lockyer is on all fours with our finding here.

38. Indicated Sellers seek clarification that the public interest standard of review does not authorize unjust and unreasonable rates. We clarify as follows. Indicated Sellers are correct that rates initially must be just and reasonable. For market-based rates, this determination is made when the authorization for market-based rates is granted. However, if rates subsequently become unjust and unreasonable and the contract at issue is subject to the Mobile-Sierra standard of review, the Commission under court precedent may not change the contract simply because it is no longer just and reasonable. If parties' market-based rate contracts provide for the public interest standard of review, the Commission is bound to a higher burden to support modification of such contracts. The public interest standard applies to changes to contract rates and "represents the Supreme Court's attempt to strike a balance between private contractual rights and the regulatory power to modify contracts when necessary to protect the public interest."[68] Our finding that changes to the challenged contracts should be evaluated under the public interest standard does not equate to a finding that the underlying rates are not just and reasonable. To the extent Indicated Sellers' request for clarification asks the Commission to opine on matters not before us in this case, we decline to do so.

39. Complainants assert that the dysfunction in the spot market caused the rates in the specific long-term market-based rate contracts at issue here to be unjust and unreasonable from the outset and, therefore, that the just and reasonable standard of review, rather than the Mobile-Sierra public interest standard of review, should apply. "Under these extraordinary circumstances," Complainants argue, "it is error for the Commission to uphold the presumption that the prices in any contract entered during the California energy crisis for delivery in the Western markets by a seller with market-based rate authority are just and reasonable."[69]

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[67] Id.

[68] Northeast Util. Serv. Co., v FERC, 55 F.3d 686, 689 (1st Cir. 1995).

[69] Complainants' Reh'g Request at 68.

40. Because a party who has executed a Mobile-Sierra contract cannot avoid its burden to show that a unilaterally proposed change is required by the public interest by claiming that the rates were not just and reasonable when that party executed the contract (unless, e.g., the contract was induced by fraud committed by the seller on the buyer), we reject Complainants' arguments.

41. We also find no merit to Complainants' claims regarding the testimony of Drs. Tabors and Stoft, which, as is clear from the testimony itself as well as from Complainants' January 10, 2003 Post-Hearing Initial Brief, their rehearing request, and other pleadings, were based on forward price curves (forward price curves internally generated by each seller, and the one produced by Navigant Consulting for the buyer). All of these forward price curve models project the various input costs (e.g., the cost of gas, NOx emission allowances) under expected future supply and demand conditions. The resulting forward price curves project the forward spot market prices for delivery of electricity over a period in the future. The sellers argue that they used their forward price curves as a floor and negotiated for higher prices. Meanwhile, Complainants argue that CDWR's own forward curve (and the sellers' internally generated price curves) stood as a ceiling and CDWR negotiated for a lower price.

42. Complainants use the expert testimony to argue that: the forward price curves can appropriately be used to test the justness and reasonableness of the rates under the long term contracts; because the forward curve model used by CDWR incorporated inputs that were not cleansed of market dysfunction, the rates CDWR negotiated were excessive; in late May 2001, the forward and spot prices declined synchronously purportedly proving that high spot prices caused forward prices to be excessive. The sellers disputed all these arguments.

43. Forward price curves are internally generated, proprietary information used by a party for its own purposes. Each seller and buyer uses its own projections and updates these daily or more often if circumstances change rapidly. Each model is slightly different in its assumptions and therefore will produce different price estimates. While this data is useful for resource planning and contract negotiation purposes, we cannot use that data to judge contract rates. Not only were these forward curve models not designed for that purpose, but the requisite transparency that Commission rate review must have is absent. Moreover, the Commission has never addressed or approved any one particular forward curve model for this purpose, and we find that, even if we could do so, we cannot do so on the record here. Accordingly, we find that it would be inappropriate to rely on the forward price curves and the testimony regarding those curves.

44. Complainants' attempt to use Drs. Pechman's and Ringo's expert testimony to argue that the contracts at issue should be modified because they differ from the advisory benchmark we provided in the December 15, 2000 Order fails as well. Additionally, Snohomish asserts that the Commission arbitrarily and capriciously found that CDWR achieved its central objective in establishing its energy portfolio despite the fact that the average price for the first five years of the terms of the contracts exceeded the advisory benchmark.[70]

45. Complainants refer to our December 15, 2000 Order[71] in which we declined to extend the California spot market mitigation measures to forward markets.[72] In that order, we also adopted an advisory benchmark of $74/MWh for five-year contracts for supply around-the-clock to be used as a reference point in addressing any complaints regarding the pricing of contracts negotiated in forward markets. While we expected that the benchmark would be helpful in assessing possible complaints challenging forward prices, we never suggested that a contractual price exceeding the benchmark would be all by itself a sufficient ground for abrogating a contract. Quite to the contrary, we expected that "buyers may elect to negotiate above [the benchmark] to the extent they believe the particular contract or supplier brings value which suits their needs (e.g., shorter term contracts, favorable terms and conditions, assignment of the risk of variable cost exposure, the particular characteristics of the supplier or its resource portfolio, etc.)."[73]

46. Complainants conceded below that the Dynegy, Mirant and Sempra contracts do not lend themselves to comparison with the five-year advisory benchmark.[74] Thus, the benchmark arguments apply only to the Coral contract. To apply the $74/MWh benchmark we set in the December 15 Order for a five-year, supply around-the-clock benchmark to the 11-year Coral contract that does not provide for supply around-the-clock, Complainants' experts used a hybrid analysis.[75] That analysis used the benchmark

[70]Snohomish Reh'g Request at 36.

[71]San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., 93 FERC ¶ 61,294 (2000) (December 15 Order).

[72]Id. at 61,994.

[73]Id. at 61,995.

[74]Complainants' January 10, 2003 Post-Hearing Brief at 92, 98, App B p. 27.

[75]Exh. CAL-112.

rate for the first five years of the contract and Coral's segmented forward curve for the remainder of the contract. We never intended such a hybrid approach to be used for benchmark comparisons, and we find that approach unsupported and unacceptable. We already have explained that it would be inappropriate to use a seller's internal forward curve to reach a determination on a contract's rates.

47. Snohomish argues that the Commission's initial review of a seller's market power for purposes of granting market-based rate authority cannot assure that all the rates the seller subsequently charges will be just and reasonable under all circumstances.[76] We agree with Snohomish's position. Indeed, we have recognized that "FPA [Section] 206 complaint procedures apply when it appears that [market-based] rates are no longer just and reasonable."[77] Should a seller acquire market power subsequent to the Commission's acceptance of market-based rates, there is a safeguard that "places sellers on notice that their transactions will be subject to review and to prospective remedial action, including the possible loss of their market-pricing authorization."[78] Contrary to Snohomish's position, however, this remedial authority does not require contract modification where the contract limits changes to those required by the public interest under Mobile-Sierra. As discussed, there has been no showing to support a finding that respondents exercised market power while selling under their market-based pricing authorization with regard to these specific contracts. Thus, there is no reason to move beyond the self-imposed limits on contract changes set by the parties in the challenged contracts. This result is consistent with both our responsibility to assure that market-based rates are just and reasonable and our long-standing respect for the sanctity of private contracts.

48. Snohomish challenges the Commission's determination, based on Borough of Lansdale v. FPC[79] and Richmond Power & Light v. FPC,[80] that Mobile-Sierra applies to

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[76]Snohomish Reh'g Request at 17, 26-29 (citing AEP Power Marketing, Inc., 97 FERC ¶ 61,219 (2001); Enron Power Marketing, Inc., 103 FERC ¶ 61,343 (2003); Enron Power Marketing, Inc., 104 FERC ¶ 63,010 at P 128 (2003)).

[77]Lockyer at 62,064.

[78]Id. at 62,065.

[79]494 F.2d 1004, 1113 (D.C. Cir. 1974).

[80]481 F.2d 490, 497 (D.C. Cir. 1973).

contracts not on file with the Commission. Contrary to Snohomish's argument, the Commission did not find Lansdale and Richmond to hold that "entities holding market-based rate certificates [are entitled] to charge unjust and unreasonable rates."[81] Instead, as Snohomish itself concedes, the Commission relied on the Lansdale and Richmond cases to demonstrate that a party may not circumvent Mobile-Sierra's limitations by failing to file a contract with the Commission.[82] The Commission reasoning here was sound.

49. Snohomish further argues that the Commission should have reviewed the contracts at issue under the just and reasonable standard to protect the rights of third parties, especially electric ratepayers.[83] In addition, Snohomish contends that the Commission at the very least should have applied the flexible public interest standard.[84]

50. There is no Commission or court precedent that supports a finding that a non-signatory party may challenge a Mobile-Sierra contract under the just and reasonable standard of review, as opposed to the public interest standard of review. The cases cited by Snohomish as dictating application of the just and reasonable standard of review are inapposite. In PJM Interconnection, LLC,[85] the Reliability Assurance Agreement explicitly permitted PJM to submit filings under Section 206 of the FPA.[86] In the instant proceeding, the contracts in question do not contain such a provision. Snohomish also cites to Carolina Power and Light Co.[87] which involved a Commission directive to revise

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[81]Snohomish Reh'g Request at 16-17.

[82]Id. at 16 (claiming that the cases hold that "utilities do not gain the right, denied them by the Mobile-Sierra doctrine, to challenge contract rates as too low simply by failing to comply with the FPA's requirement that all jurisdictional contracts be on file with the Commission.").

[83]Snohomish Reh'g Request at 39-40.

[84]Snohomish Reh'g Request at 41 (citing Snohomish Brief on Exceptions at 13-15).

[85]PJM Interconnection, LLC, 96 FERC ¶ 61,206 (2001).

[86]See id. at 61,878 n.12.

[87]Carolina Power and Light Co., 69 FERC ¶ 61,078 (1994).

a settlement agreement that had been submitted for Commission acceptance, and not, as in this case, a complaint challenging an existing market-based rate contract for the sale of power. Finally, Snohomish refers to Pennsylvania Electric Co.[88] which speaks in general terms about the Commission's statutory duty to ensure just and reasonable rates. However, the Commission has applied the public interest standard of review to challenges brought by non-contractual parties.[89] In addition, we found no basis for applying a more flexible public interest standard to the contracts at issue. The record shows that the third-party intervenors were not adversely affected by the contract at issue. Similarly, Complainants have failed to show that the contracts at issue imposed an excessive burden on California's ratepayers.

51. Complainants and Snohomish nonetheless assert that the Mobile-Sierra public interest standard of review does not apply to the contracts at issue because, purportedly, Complainants are third parties to the contracts as CDWR, rather than the CPUC or CEOB, executed the contracts. As we previously found,[90] however, the State of California, through one of its agents, CDWR, was a party to the contracts. Complainants, like CDWR, are agents of the State of California, and, therefore, in bringing these complaints, Complainants stepped into the shoes of CDWR as a representative of the State of California. Complainants' own rehearing request supports this conclusion. Throughout the rehearing request, Complainants acknowledge that the buyer under these contracts was the State of California.[91]

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[88]Pennsylvania Electric Co. v. FERC, 11 F.3d 207 (D.C. Cir. 1993).

[89]See, e.g., July 23 Order, 100 FERC at 61,396.

[90]June 26 Order at P 76.

[91]See, e.g., Complainants' Reh'g Request at 48 ("the State of California was forced to step in as the entity responsible for purchasing California's "net short,"); Complainants' Reh'g Request at 32 ("it was necessary for the State of California to take the unprecedented step of becoming the buyer for most of the load of the entire state. It did so by authorizing CDWR to purchase the State's 'net short . . . ."); Complainants Reh'g Request at 63 ("the State on the public's behalf . . . enter[ed] the long-term contracts).

52. There also is no merit to Complainants' claim that the Commission's statement in the December 15 Order, that "[t]o address concerns about potentially unjust and unreasonable rates in the long-term markets, we will monitor prices in those markets,"[92] "informed buyers and sellers that the Commission would scrutinize long-term contract rates under a just and reasonable standard."[93] The referenced statement in the December 15 Order did not, and did not intend to, inform any one that unilaterally proposed rate changes to contracts universally would be reviewed under a just and reasonable standard of review. Under Mobile-Sierra, unless the parties to a contract reserve their rights to unilaterally propose a rate change, the Commission can grant a unilateral request for a rate change only if the proposed change is required by the public interest. We cannot, and did not attempt to, trump the mandates of that long-standing case law.

53. There also is no merit to Complainants' contention that the Mobile-Sierra doctrine does not apply to the contracts here because the doctrine is not intended to protect the sanctity of contracts entered into by wrongdoers[94] or the contention that the public interest standard of review is satisfied because "it is against the public interest for sellers to retain the benefits of contracts entered into by virtue of their market-based authority, but which market-based authority they abused."[95] Complainants do not cite to any precedent for these propositions. More importantly, the wrongdoing cited by Complainants involves alleged activities by Mirant and Dynegy in the spot markets, not the forward markets. As mentioned above, we found nothing in the record, in the Staff Report, or in the 100-Day Discovery Proceeding evidence to support a finding that there was market manipulation specific to the long-term contract negotiations resulting in the prices and terms challenged here.[96]

54. In discussing the ALJ's initial decision in the June 26 Order, we stated that she noted that "while the Mobile-Sierra doctrine arose in the context of a completely regulated environment, where, as here, the contracts were entered into under the parties'

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[92]December 15 Order, 93 FERC at 61,994.

[93]Complainants' Reh'g Request at 9.

[94]Complainants' Reh'g Request at 10-12, 22.

[95]Complainants' Reh'g Request at 12.

[96]June 26 Order at P 61.

market-based rate authority, the Commission has stated that '[p]reservation of the contracts has, if anything, become even more critical.'"[97] Complainants ask us to explain this statement. As we explained in the April 25 Order:

> The Commission's long-standing policy, consistent with a substantial body of Supreme Court and other judicial precedent, has been to recognize the sanctity of contracts. Rarely has the Commission deviated from that policy, and then only in extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a bankrupt utility. Preservation of contracts has, if anything, become even more critical since the policy was first adopted. Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty, including certainty that the Commission will not modify market-based contracts unless there are extraordinary circumstances.[98]

55. The critical point is not, however, that sanctity of contracts is even more important in a market-based rate system, but that sanctity of contracts remains vitally important whether the regulatory system is cost-based or market-based.

56. Snohomish argues that the Mobile-Sierra doctrine applies only in situations where a regulated utility is challenging a contract with a rate it argues is too low.[99] As we stated in the June 26 Order, "[i]n later cases, the Mobile-Sierra doctrine was applied to contracts containing rates that allegedly were too high."[100] Snohomish, however, believes that the PSC of New York[101] case the Commission relied on is inapposite.[102] We disagree. The court in PSC of New York held that the Mobile-Sierra doctrine protects contracts, not

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[97] Id. at P 64 (quoting Partial Initial Decision, 102 FERC at P 31 (quoting April 25 Order, 99 FERC at 61,383)).

[98] April 25 Order, 99 FERC at 61,383 (footnote omitted).

[99] Snohomish Reh'g Request at 12.

[100] June 26 Order at P 6.

[101] Public Service Commission of the State of New York v. FPC, 543 F.2d 757 (D.C. Cir. 1974) (PSC of New York).

[102] Snohomish Reh'g Request at 15-16.

rates; it obligates both buyers and sellers, and the Commission is no more at liberty to alter a contract "to the prejudice of the producers than to do so in their favor."[103] In addition, the Mobile-Sierra doctrine has been applied in other cases where a complainant sought to reduce the existing rate.[104]

2. Whether Complainants Met Their Public Interest Burden.

57. Complainants also argue that they have met their public interest burden regarding the contracts at issue. First, Complainants, and Snohomish, assert that the Commission failed to recognize that the three-part Sierra "test" is not the sole measure of the public interest standard.[105] This assertion is incorrect. The June 26 Order explicitly found that the Complainants failed to demonstrate any of the three public interest factors addressed in Sierra or any other factors showing that modifying the contracts is required by the public interest.[106] On rehearing, we also have fully considered and addressed all of Complainants' public interest claims. Our discussion of those claims in the June 26 Order and in this Order makes clear that we reject the claims not because we believe we are restricted to considering only the three factors enunciated in Sierra, but because we find the claims do not satisfy Complainants' public interest burden. Thus, we reject this and any other arguments premised on the Commission restricting its consideration of the public interest to the three factors addressed in Sierra because they have no basis in fact. For these same reasons, we reject Snohomish's argument that the Commission ignored every aspect of the public interest outside of the contract negotiations despite evidence of fraud, abuse and manipulative practices.[107]

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[103] PSC of New York, 543 F.2d at 798.

[104] PEPCO, 210 F.3d 403.

[105] Complainants' Reh'g Request at 13, 15, 64, 65; Snohomish Reh'g Request at 32.

[106] June 26 Order at P 8, 39.

[107] Snohomish Reh'g Request at 34-35.

58. Snohomish argues that the June 26 Order is inconsistent with decisions in French Broad Elec. Membership Corp. v. Carolina Power & Light Co.[108] and Texaco v FERC.[109] In addition, Snohomish claims that the public interest is met because (1) there is evidence that the bargaining process leading to the execution of the contracts was not the product of a functionally competitive market, and (2) after a period of market dysfunction, the contracts were no longer economical.[110]

59. In the June 26 Order, we determined that Complainants failed to demonstrate that contract modification was required by the public interest.[111] We considered whether Complainants had demonstrated that "any of the three prongs announced in the Sierra case [was] met or that any other factor introduced into evidence warrant[ed] a finding that any of the contracts is contrary to the public interest and should be modified."[112] We found none of the Sierra factors to be present here--whether the rate might impair the ability of the public utility to continue service, cast upon other consumers an excessive burden, or be unduly discriminatory. Moreover, we considered the totality of the circumstances preceding and following the execution of the contracts and found that none justified contract modification.

60. Further, we find Snohomish's reliance on Atlantic City Elec. Co. v. FERC,[113] Northeast Utils. Service Co. v. FERC,[114] and Town of Norwood v. FERC[115] to be misplaced. Snohomish's claims that all three demonstrate that the public interest

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[108]92 FERC ¶ 61,283 (2000).

[109]Texaco, 148 F.3d at 1097.

[110]Snohomish Reh'g Request at 33-34.

[111]June 26 Order at P 3, 8, 39, 60-63.

[112]Id. at P 39.

[113]295 F.3d 1, 14 (D.C. Cir. 2002), remanded, 101 FERC ¶ 61,318 (2002), vacated in part, 329 F.3d 856 (2003).

[114]993 F.2d 937, 961 (1st Cir. 1993), remanded, 66 FERC ¶ 61,332, reh'g denied, 68 FERC ¶ 61,041, aff'd, 55 F.3d 686 (1995).

[115]587 F.2d 1306, 1313-14 (D.C. Cir. 1978).

standard of review is met when "there is evidence that the bargaining process leading to the execution of the contracts was not the product of a functionally competitive market."[116] However, Snohomish's reading of the cases is not entirely accurate. All three cases recognize that Mobile-Sierra preserves the parties' bargain as reflected in the contract, when there is no need to question what transpired at the contract formation stage.[117] Our decision here is consistent with those cases, as there has been no showing to support a finding of fraud, duress, or the exercise of market power at the contract formation stage.[118]

61. In addition, we reject Snohomish's contention that there are broad policy concerns sufficient to satisfy Mobile-Sierra's public interest standard.[119] There is no policy initiative that would be served by modifying the challenged contracts. The cases on which Snohomish relies involve "extreme circumstances, such as the fundamental industry-wide restructuring under Order No. 888 and the reorganization of a bankrupt utility."[120] Contract modification here is, if anything, contrary to the Commission's policy of respecting contract sanctity and creating the regulatory certainty needed to attract sufficient capital to competitive power markets.

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[116]Snohomish Reh'g Request at 33.

[117]295 F. 3d at 14; 993 F.2d at 961; 587 F.2d at 1313-14.

[118]Contrary to Snohomish's argument, we did not, nor did we intend to "require[] a showing of unfairness, bad faith, or duress" to modify contracts under the public interest standard. Snohomish Reh'g Request at 37. In our June 26 Order, we recognized these criterion as three possible grounds to support a public interest finding, but in no way limited our inquiry to these three.

[119]Snohomish Reh'g Request at 33 & n. 117; 37-38 & n. 137.

[120]April 25 Order , 99 FERC at 61,383 (citing Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group, et al. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom. New York v. FERC, 535 U.S. 1 (2002); Northeast Util. Serv. Co., 66 FERC ¶ 61,332, reh'g denied, 68 FERC ¶ 61,041 (1994)).

62. Indicated Sellers contend that we erred to the extent we relied in the June 26 Order on extrinsic evidence in determining that the public interest standard of review applies to the contracts at issue. Indicated Sellers seek clarification or rehearing that, unless contractual language preserves rights to make unilateral application to the Commission for changes in rates, the Mobile-Sierra public interest standard of review applies. We deny clarification or rehearing on that issue here. Complainants made clear that they "have not argued, or submitted evidence, to the effect that the absence of an explicit Mobile-Sierra provision in the [Dynegy and Sempra] contracts is itself a basis for not applying the Mobile-Sierra standard to those contracts."[121] Thus, Complainants conceded that "to the extent the Mobile-Sierra standard applies to the contracts with explicit Mobile-Sierra provisions [the Mirant and Coral contracts], it applies to the contracts without such provisions."[122]

63. Next, Complainants claim that "it is against the public interest for the ultimate consumers to be burdened with contracts that impose unjust and unreasonable rates."[123] In Complainants' view, "[w]hen the subject rates are imposed directly on the public, unjust and unreasonable does mean contrary to the public interest."[124]

64. While Complainants have alleged that the contract rates currently exceed those available in today's markets, that allegation, even if true, does not establish that the contract rates are contrary to the public interest. Our precedent "makes clear that the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest."[125] Additionally, even if the contract rates at

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[121] See Partial Initial Decision at P 44 (quoting Complainants' January 14, 2003 Answer to Motion to Hold Briefing in Abeyance).

[122] Id.

[123] Complainants' Reh'g Request at 12.

[124] Complainants' Reh'g Request at 72; see also Complainants' Reh'g Request at 17-18.

[125] PEPCO, 210 F.3d at 409. Snohomish contends that the Commission erred in relying in its decision on PEPCO in which the court held that a showing of "a mere rate disparity or a benefit to the purchasing utility or its customers for a rate modification does not suffice, without more, to satisfy [the 'public interest'] standard." Id. at 404. In Snohomish's opinion, PEPCO and the instant case are factually different and thus PEPCO is inapplicable. In deciding whether the Complainants met their burden of proof (continued…)

issue will be passed through entirely to ultimate customers, Complainants have failed to show that would be contrary to the public interest.

65. We agree with Complainants that an important public interest is the interest in functioning competitive markets. In this proceeding, however, we have found that the record does not substantiate that the contracts in question caused financial distress for the Complainants (or others they represent), threatening their ability to continue service; that the contracts cast an excessive burden on customers; that the contracts were unduly discriminatory; or any other factors showing that modifying the contracts is required by the public interest,[126] and we have found nothing in the record, in the Staff Report, or in the 100-Day Discovery Proceeding evidence to support a finding that there was market manipulation specific to the long-term contract negotiations resulting in the prices and terms challenged here.[127] Therefore, we find no merit to Complainants' contentions that our determination that modification of the instant contracts is not required by the public interest allows "market abusers [to] keep the benefits of high rates that their abuses helped bring about"[128] and "effectively declares that as between remedying unjust and unreasonable rates borne by the public itself resulting from circumstances involving

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under the public interest standard of review, we were guided by the court case law developed over several decades. Upon the review of the evidentiary record developed in this proceeding, the findings of the Staff Report, and evidence submitted in the 100-Day Discovery Proceeding, we concluded that the challenged contracts were not contrary to the public interest because the Complainants failed to demonstrate that the contracts in question caused financial distress for the Complainants (or others they represent) so as to threaten their ability to continue service, that the contracts cast an excessive burden on customers, that the contracts were unduly discriminatory to the detriment of other customers that were not parties to this proceeding, or that any other factors on the record of this proceeding demonstrate that the contracts were contrary to the public interest. June 26 Order at P 8.

[126]June 26 Order at P 8, 39, 60.

[127]June 26 Order at P 61.

[128]Complainants' Reh'g Request at 16.

seller misconduct . . .and allowing the same sellers to preserve the benefit of their unfair bargain, the latter is more in the public interest."[129]

66. We also find no merit on the facts here to Complainants' argument that "the Commission should find it is in the public interest to modify contract rates that are 'so high' as to reflect exploitation of the buyer by the seller."[130] We have appropriately applied the public interest standard in this proceeding and found that Complainants have not met their burden of proving that the contracts cast an excessive burden on customers.

67. Complainants' contention that the contracts should be modified even if the rates burden customers in some degree less than excessive[131] is similarly inapposite. We have appropriately applied the public interest standard of review in this proceeding and found that Complainants have not met their burden under that standard.

68. We also reject Complainants' argument that our determination that reformation of the instant contracts is not required by the public interest conflicts with our application of the public interest standard of review in El Paso Natural Gas Co.[132] In El Paso, consistent with our holding here, we explained that "only in extraordinary circumstances, and only where the public interest so requires, will the Commission order contract modification. For example, the Commission has ordered contract modification in connection with its restructuring of the natural gas and electric industries."[133] Unlike in El Paso, where we found reformation necessary in the public interest because continued service under the existing contracts would continue the ever increasing degradation to firm service under those contracts contrary to the concept of firm service and our regulations,[134] we have determined that Complainants have not shown that any public interest requires contract modification here.

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[129]Complainants' Reh'g Request at 22; see also Snohomish Reh'g Request at 35 (arguing that the Commission has elevated the interests of regulated utilities above the interests of electric consumers).

[130]Complainants' Reh'g Request at 14.

[131]Complainants' Reh'g Request at 14; see also Snohomish Reh'g Request at 36.

[132]99 FERC ¶ 61,244 (2002) (El Paso); Complainants' Reh'g Request at 16.

[133]El Paso, 99 FERC at 62,005 (footnotes listing citations omitted).

[134]El Paso, 99 FERC at 62,003, 62,005-06.

69. Complainants make a number of arguments challenging our finding that CDWR had options and at least some bargaining power when it entered into the portfolio of contracts at issue here. First, Complainants argue that the available alternatives "were not those that would have been presented in the absence of spot market dysfunction."[135] Complainants' argument is not pertinent here. Complainants were required to meet the public interest standard of review, not the just and reasonable standard of review which could have taken into account the causal connection between the spot market prices and forward bilateral market prices.[136]

70. Moreover, Complainants' claim that "there is no evidence in the record – none-indicating that CDWR could have met the California net short at just and reasonable prices,"[137] improperly inverts the burden of proof here. Complainants, as the proponents of unilateral changes to Mobile-Sierra contracts, have the burden to show that the public interest requires contract modification. Thus, no one had the burden to establish that California's net short could have been met at just and reasonable prices.

71. Complainants' assertion that, because sellers had the choice of selling their power into the spot market rather than entering into long-term contracts with CDWR, CDWR lacked bargaining power and had to pay a significant premium to obtain the contracts at issue[138] fails as well. As the experience in California illustrates, sellers who choose to forego entering into long-term power sales contracts assume the risk that spot prices will decrease below the prices they could have obtained in those long-term contracts. Thus, both buyers and sellers have an equal incentive to avoid the price risks innate to spot market sales and to obtain the security long-term contracts provide.

72. Complainants also contend that the fact that CDWR received hundreds of long-term contract offers "does not establish that it had any meaningful bargaining power or that the contract prices were just and reasonable."[139] Our determination that CDWR had bargaining power regarding the contracts at issue was based on our consideration of all

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[135]Complainants' Reh'g Request at 21.

[136]June 26 Order at P 37.

[137]Complainants' Reh'g Request at 20.

[138]Complainants' Reh'g Request at 49.

[139]Complainants' Reh'g Request at 49.

the factors discussed in the June 26 Order, not merely on the large number of bids received.

73. Moreover, Complainants claim on the one hand that "[m]any of the bids were mutually exclusive,"[140] and, therefore, by definition in competition with each other, while claiming on the other hand that CDWR "[was] not having proposals that were competing against each other."[141] In any event, that many of the bids received were mutually exclusive (or were for less than 100 MWs, or were made by unknown entities with no experience in the power industry)[142] does not negate the myriad other factors we found established California's bargaining power,[143] including that CDWR was able to assemble a portfolio of about 41 contracts for about 12,000 MW during the peak year.[144] And, while Complainants assert that "many of the offers did not start deliveries until after the summer of 2001,"[145] all of the contracts at issue here provided for deliveries during that summer.

74. Complainants' attempt to cast CDWR as lacking bargaining power because, purportedly, the bids received reflected market dysfunction compared to cost-based pricing[146] fails as well. A disparity between market-based and cost-based rates is not sufficient to demonstrate a party's market power or lack of bargaining power.

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[140]Complainants' Reh'g Request at 49.

[141]Complanaints' Reh'g Request at 51.

[142]Complainants' Reh'g Rrequest at 51.

[143]See, e.g., June 26 Order at P 43-59.

[144]June 26 Order at P 49.

[145]Complainants' Reh'g Request at 51.

[146]Complainants' Reh'g Request at 51.

75. Additionally, that CDWR purportedly made certain concessions regarding the terms of certain contracts[147] does not negate that CDWR was able to obtain many concessions from sellers, including obligating many, if not all, of the sellers to: (1) make immediate and/or near-term sales to CDWR at below-market prices, (2) assume transmission and congestion risk and provide high supply availability guarantees, (3) allow CDWR to dispatch the supplier's generation, (4) assume the risk of changes in fuel prices, and (5) provide CDWR the option of choosing seller-supply and/or CDWR-supply of natural gas.[148] In certain contracts, even though the sellers proposed a fuel price indexing formula, CDWR insisted on a fixed price, thereby leaving sellers to bear the risk that fuel prices would increase in the future.[149]

76. Complainants protest that CDWR's ability to contract for energy in 2001 at below market prices does not indicate that CDWR had bargaining power because "each of the contracts was priced above the then existing market forward price curve such that any below-market sales in 2001 were more than made up over the life of the contract."[150] That protest, like Complainants' earlier argument, inappropriately compares internally generated forward price curves to contract rates in an attempt to show that the contract rates are unjust and unreasonable or contrary to the public interest. As we explained above, internally generated forward price curves cannot be used to judge contract rates. For the same reasons, they cannot be used to show lack of bargaining power. Even if Complainants' assumption were correct, however, that does not diminish that CDWR was able to bargain and contract for energy at below market prices in the immediate and/or near term, when energy was critically needed.

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[147]Complainants' Reh'g Request at 51-54, 59-60. Complainants assert that CDWR agreed to a longer term than it wanted in the Sempra contract in order to foster Sempra's construction of new power plants, but that "Sempra claims that the contract does not require it to build any of the plants whose output CDWR was contracting for, and Sempra has aggressively asserted its right, in its sole discretion, to refuse to build such plants and to provide power purchased in the market." Complainants' Reh'g Request at 59. That assertion does not reflect on CDWR's bargaining power but involves a contract interpretation dispute that does not belong in this proceeding.

[148]June 26 Order at P 54 (citing Exh. COR-1 at 46:3-47:5; Exh. AYE-14 at 3:1-4:20; Exh. EPME-28 at 10:4-14; Exh. MAEM-1 at 13:5-18; Exh. MSC-1 at 6:16-7:2; Exh. SER-1 at 25:8-26:21; Exh. DYN-1 at 26:15-27:3).

[149]Id. (citing Exh. S-1 at 25:8-11).

[150]Complainants' Reh'g Request at 59.

77. Complainants assert that CDWR did not want ten-year contracts but wanted contracts with terms of one to three years. That assertion is belied, however, by the fact that CDWR's second request for bids did not indicate a preference for any particular contract term.[151]

78. And, while Complainants assert that CDWR did not achieve its purported goal of one-to-three year contracts with an average price of $70/MWh, CDWR did achieve a central objective of obtaining a portfolio of contracts that yielded a weighted average price no higher than $70/MWh, the average cost of energy supply reflected in the IOUs' retail rates as of January 2001.[152] That CDWR may not have obtained the exact bargain it had in mind does not establish that it lacked bargaining power. Rather, it simply shows that the give-and-take innate to negotiation occurred.

79. Complainants also argue that the Commission erred in stating in the June 26 Order that "Complainants benefited from resales of the energy purchased under these contracts during the relevant period"[153] because, in Complainants' view, "there is no evidence in the record (and the Commission cites none) that Complainants (or even CDWR) benefited from the power sales."[154] In stating that "Complainants benefited from resales of the energy purchased under these contracts during the relevant period," we meant only that California benefited by entering into the contracts at issue because California was able to resell the power obtained under the contracts to meet California's energy needs. The record certainly supports that finding.[155]

80. We also find no merit to Complainants' argument that the dysfunction in the spot markets, the California Power Exchange ceasing operations and declaring bankruptcy, the bankruptcy and near-bankruptcy of two California investor owned utilities, and

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[151]June 26 Order at P 48.

[152]June 26 Order at P 40.

[153]June 26 Order at P 8.

[154]Complainants' Reh'g Request at 21.

[155]Complainants' own rehearing request states that CDWR sought this outcome. Complainants' Reh'g Request at 49 (stating that CDWR chose to "purchase the electricity through long-term contracts and thereby reduce the reliance on the spot market and obtain a reliable supply at lower immediate cost.")

California "tak[ing] the unprecedented step of becoming the buyer for most of the load for the entire state," constitute extraordinary circumstances that satisfy the Mobile-Sierra standard.[156] Complainants have not shown that, on balance, the prices in the challenged contracts harmed the public interest as envisioned in Mobile-Sierra.

81. Nor are Complainants correct that we did not consider the totality of the circumstances. In both the June 26 Order and here, we have considered the totality of the circumstances surrounding these contracts, including the California energy crisis and related events. Complainants have failed to establish, however, that any of those circumstances caused the contracts at issue to be contrary to the public interest.

82. Complainants' next contention, that the instant contracts "burden consumers with forward prices 33-60% in excess of a just and reasonable price," which constitutes an extraordinary circumstance satisfying the Mobile-Sierra standard,[157] fails as well. Complainants do not cite the basis for their 33-60% figure, and we know of none in this record. Furthermore, we have found that the Complainants failed to demonstrate that the contracts in question cast an excessive burden on customers.[158]

83. While Complainants argue that they demonstrated that the contracts were priced above long-run competitive prices, they base that claim on the testimony and evidence presented by Drs. Tabors and Stoft. We have found that testimony and evidence to be based on forward price curves that cannot appropriately be used for such a comparison. Complainants' other asserted evidence, the Staff Report, did not, contrary to Complainants' assertion, "find[] that forward prices in the 1-2 year class of contracts [were] unjust and unreasonable as a result of spot market dysfunction."[159] The Staff Report did not make any findings regarding the justness and reasonableness of any contract rates and any such findings would not be relevant here because the just and reasonable standard is not applicable.

84. Complainants' effort to diminish the impact of the fact that CDWR assembled a highly sophisticated procurement team to assist in its contracting decisions is unavailing.

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[156] Complainants' Reh'g Request at 32.

[157] Complainants' Reh'g Request at 32.

[158] June 26 Order at P 8, 39, 60.

[159] Complainants' Reh'g Request at 42.

The procurement team's sophistication is part of the totality of the circumstances that informs our analysis of the public interest regarding the contracts in this case.

85. Despite Complainants' claims to the contrary,[160] comments by the California officials indicating that they fully supported the price, terms and conditions made contemporaneous with the contracts' execution are relevant, along with all other factors, to our determination of whether the instant contracts should be modified under the FPA. For example, a memorandum prepared by a member of California's negotiating team stating that "[e]ach power purchase agreement was the subject of often protracted negotiations. Frequently, sellers had to concede numerous points to obtain the terms and provisions they ultimately ended up with in the agreements,"[161] confirms that numerous concessions were made by sellers to obtain the contracts. Similarly, CDWR's lead negotiator's statement that "I can't get terribly upset by these critics who say oh, by gosh, this is higher than what the price might be. Well, hell, they don't know. We didn't just fall off a turnip truck. I am not saying we took the shirt off their back. But I am saying that these were fair, negotiated, hard-fought deals,"[162] corroborates that California's contracting team was sophisticated and engaged in fair and real negotiations.

86. Complainants' claim that they demonstrated bad faith, unfairness and duress by the respondents, proffering the "evidence in the Final Staff Report and 100-day submissions that the entire California energy crisis was caused in large part by the rampant and widespread market manipulation by numerous sellers, which led to the insolvency of the IOUs and in turn forced the California public to enter the long term contracts through CDWR in order to avoid continued blackouts and stage 3 alerts."[163] Complainants' proffer does not suffice because, even if true, it does not show bad faith, unfairness or duress by any seller in the original negotiations of the contracts at issue as is required. Furthermore, the record evidence demonstrates that market fundamentals such

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[160] Complainants' Reh'g Request at 56-57.

[161] June 26 Order at P 50 (citing Exh. AYE-51 at NAV08-016238; Tr. at 1561:14-1562:18).

[162] Id. (citing Exh. DYN-26 at 152:16-153:8).

[163] Complainants' Reh'g Request at 63-64.

as increased demand, reduced generation and increased fuel costs were variables that contributed significantly to the escalation in market prices.[164]

87. Snohomish argues that the June 26 Order suggests two contradictory tests for meeting the burden of proof under the public interest standard of review. According to Snohomish, these tests are the Sierra three-prong test and the requirement to show market manipulation specific to the contracts at issue, as well as "unfairness, bad faith, or duress during the original negotiations."[165] In the alternative, Snohomish argues that the contracts were the product of market manipulation.

88. We disagree. In the June 26 Order, we did not create two different public interest tests. Our statement that "there [was] nothing in the record, in the Staff Report, or in the 100-Day Discovery Proceeding evidence to support a finding that there was market manipulation specific to the long-term contract negotiations resulting in prices and terms being challenged here"[166] was in response to the Complainants' contention that contract

[164]Exh. MSC-7 at 5:15-6:3; MSC-7 at 8:12-9:12; Exh. AYE-1 at 13:1-9; Exh. MSC-7 at 11:20-12:4; Exh. MSC-7 at 9:15-10:6; Exh. MSC-7 at 10:7-12; Exh. MSC-7 at 11:6-9; Exh. COR-25 at 12:4-9; Exh. MSC-7 at 11:19-20; Exh. EPME-1 at 18:15-17; Exh. COR-25 at 11:6-13, 12:7; Exh. COR-25 at 18:12-22; Exh. EPME-1 at 28:13-15; Exh. COR-25 at 12:16; Exh. EPME-1 at 16:8-17:3; Exh. EPME-1 at 40:15-41:1; Exh. EPME-14A; Exh. EPME-1 at 21:6-11; Exh. MSC-7 at 59:3-16; Exh. COR-25 at 22:1-3; Exh. EPME-1 at 45:8-14; Tr. at 835:20-836:4; Exh. MSC-7 at 19:2-9; Exh. MSC-7 at 19:11-13; Exh. COR-25 at 15:16-17; Exh. EPME-1 at 18:5-14; Exh. EPME-3; Exh. COR-25 at 15:16-23; Exh. MSC-7 at 28:12-29:2; Exh. MSC-7 at 19:14-17; Exh. COR-25 at 23:19-24:6; Tr. at 839:8-9; Exh. COR-25 at 14:2-4; Exh. AYE/SER-1 at 16:7-15; Exh. AYE-1 at 17:3-10; Exh. MSC-7 at 37:15-16; Exh. COR-25 at 11:6-13, 14:6-25; Exh. MSC-7 at 41:6-12; Exh. MSC-7 at 43:10-13; Exh. COR-25 at 23:12-18; Exh .MSC-7 at 39:5-10; Tr. at 838:20-25; Exh. EPME-1 at 22:5-11; Exh. MSC-7 at 31:8-13, 31:16-20; Exh. MSC-7 at 33:8-16; Exh. EPME-56 at 1:11-18; Exh. COR-48 at 12:15-17; Exh. EPME-1 at 21:9-22:2; San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., 93 FERC ¶ 61,121 at 61,354-55, 61,358-59; Exh. S-2 at 7:6-17, 17:9-14. See also Oral Argument Transcript at 12:17-19 (May 15, 2003) ("We have recognized in our proceeding throughout, that there were underlying market fundamentals at work that created tight markets in California.").

[165]Snohomish Reh'g Request at 32-33, 37.

[166]June 26 Order at 61.

modification is warranted based on the Staff Report findings and the 100-Day Discovery Proceeding allegations of manipulation in the spot market. We reviewed the Staff Report findings and evidence submitted in the 100-Day Discovery Proceeding and found no evidence supporting a finding of market manipulation that specifically affected the contracts at issue.

89. Snohomish also challenges the Commission's finding that "because there is no evidence of unfairness, bad faith, or duress in the original negotiations, Complainants are not entitled to change CDWR's bargains."[167] Snohomish contends that the showing of unfairness, bad faith, or duress is not required to meet the public interest standard of review.

90. We disagree. In the April 25 Order, we instructed the ALJ to consider and the parties to submit evidence on "the totality of purchases and sales and the conditions present at the time the contracts were entered into."[168] As we stated in the July 23 Order, the instructions were tailored to "assist the judge in focusing on the main issue that the hearing is intended to resolve."[169] Whereas "unfairness, bad faith, or duress in the original negotiations" were not explicitly mentioned, such evidence could be relevant to the conditions present at the time of contract formation and whether the Commission should uphold or modify the challenged contracts. Moreover, as we stated in the July 23 Order, the list of evidentiary requirements was not exclusive; the parties were free to offer other evidence deemed by the ALJ to be relevant to the Commission-prescribed scope of the hearing.[170]

91. Furthermore, as Snohomish acknowledges in its rehearing request, the three-part Sierra "test" is illustrative and other factors can be considered.[171] We believe that a showing of fraud, duress, or bad faith between the parties at the contract formation stage could be an alternative ground for modifying the challenged contracts. Our review of a broader range of evidence concerning the circumstances surrounding formation of the

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[167] June 26 Order at 62; Snohomish Reh'g Request at 37.

[168] April 25 Order, 99 FERC at 61,384.

[169] July 23 Order, 100 FERC at P 14.

[170] Id.

[171] Snohomish Reh'g Request at 32-34.

contracts at issue imposed no harm on the Complainants. However, the Complainants failed to make this showing; they also failed to meet the Sierra three-prong test or demonstrate that contract modification is justified based on the totality of circumstances.[172] On rehearing, we also have fully considered and addressed all of Complainants' public interest claims. Our discussion of those claims in the June 26 Order and in this Order makes clear that we reject the claims because we find the claims do not satisfy Complainants' public interest burden.

92. Complainants also argue that the contracts should be modified because the requested remedy would allow every seller to recover all its legitimate costs, plus a reasonable rate of return, and that, in the extraordinary circumstances here, that remedy would not create precedent that would impede contract formation in the normal course. We cannot subvert the mandates of the Mobile-Sierra doctrine, however, absent demonstrated harm to the public interest. Complainants have not satisfied that burden here.

93. Complainants claim that the instant contracts must be modified to correct a lack of confidence in competitive markets caused by the energy crisis in California. Even assuming there is a lack of confidence in competitive markets caused by the energy crisis in California, Complainants are merely speculating, without making a supportive showing, that modifying the long-term contracts here would cure it. We find no basis for Complainants' speculative claim.

94. Next, Complainants and Snohomish assert that it is inconsistent and a disincentive for buyers to enter into future long-term contracts for the Commission to order refunds of unjust and unreasonable spot market rates but to deny modification of the contracts here. In making this assertion, Complainants ignore that these spot market sales are not subject to the mandates of the Mobile-Sierra doctrine, while the long-term forward contracts at issue here are. Thus, while we are bound by a public interest standard in reviewing the complaint here, we are bound only by a just and reasonable standard in reviewing the California spot market sales. They also ignore that buyers can retain their rights to unilaterally file for rate changes under the just and reasonable standard by including a provision to that effect in their contracts. The latter fact also critically undermines Complainants' contention that the Mobile-Sierra doctrine can be construed as providing a disincentive for long-term contracting.

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[172] June 26 Order at P 8, 39, 60-63.

95. While Complainants protest that we have held them to an inappropriate burden of proof, contending that they only had to come forward with a prima facie case, the law is clear that the proponent of a unilateral change to a Mobile-Sierra contract has the burden to show that the public interest requires that change.[173] We held Complainants to the appropriate burden of proof here. For this same reason, we reject Snohomish's argument that the burden of proof required in proceedings under Section 205 of the FPA is applicable here.[174]

96. In the background section of the June 26 Order, we noted that, in an April 25 Order,[175] we dismissed the complaints as to contracts entered into after June 20, 2001, the date on which our West-wide mitigation went into effect.[176] California (by Complainants CEOB and the California Public Utilities Commission) sought but was denied rehearing on that issue in the July 23 Order.[177] Complainants' renewal here of their objection to our holding in the April 25 and July 23 Orders is an improper collateral attack on those orders and is, therefore, dismissed.

97. Complainants are concerned that in the June 26 Order we did not address matters it raised that were set out in Appendix C of that order. In the June 26 Order, however, we considered those arguments and found them unpersuasive. Moreover, in this Order, we again have considered and discussed Complainants' arguments set out in Appendix C of the June 26 Order.

98. On rehearing, Complainants raise, for the first time, the argument that the ALJ erred by excluding the testimony of Stephen Sorey.[178] Complainants do not explain why they waited until after the June 26 Order was issued to raise for the first time on rehearing such a fundamental issue. The Commission generally looks with disfavor on parties

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[173] Texaco, 148 F.3d at 1096-97.

[174] Snohomish Reh'g Request at 30-31.

[175] April 25 Order, 99 FERC at 61,383-84.

[176] June 26 Order at P 11.

[177] July 23 Order, 100 FERC ¶ 61,098.

[178] Complainants' Reh'g Request at 25.

raising on rehearing issues that should have been raised earlier.[179] Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision. Absent good cause, not present here, we will not consider Complainants' new argument raised for the first time on rehearing. Furthermore, since Complainants did not except to the ALJ's evidentiary ruling, its objections were technically waived under Rule 711(d)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.711(d)(2) (2003).

99. Moreover, even if we were to consider Complainants' new argument, we affirm the ALJ's ruling that this testimony was outside the scope of the proceeding because it related to a Sacramento Municipal Utility District long-term contract with Duke Energy Trading & Marketing, LLC not at issue here and thus should be stricken.[180] Furthermore, even if this evidence were included in the record, it would not change our decision. Complainants state that "Mr. Sorey testified that market participants at the time knew the spot market prices were inflated by dysfunction, expected such dysfunction to continue indefinitely, and specifically did not expect that the Commission's December 15 Order would eliminate the effects of such dysfunction."[181] These statements address the issue of whether there was dysfunction in the spot market, a fact not at issue in this proceeding. Therefore, it is not pertinent to our decision.

100. Complainants reassert their objection to the ALJ's exclusion of evidence of market manipulation.[182] We reiterate our finding that the ALJ properly interpreted the Commission orders on this issue and appropriately ruled to exclude the evidence.[183] Additionally, Complainants had the opportunity to present evidence adduced in the 100-

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[179]Tenaska Power Services Co. v. Southwest Power Pool, Inc., 102 FERC ¶ 61,140 at P 14 (2003) (citing Baltimore Gas & Electric Company, et al., 91 FERC ¶ 61,270 at 61,922 (2000); Northern States Power Company (Minnesota), et al., 64 FERC ¶ 61,172 at 62,522 (1993); Cities and Villages of Albany and Hanover, Illinois, et al., 61 FERC ¶ 61,362 at 62,451 (1992)). See also Rule 711(d)(2).

[180]See Transcript of Prehearing Conference at 331:6-22 (Oct. 30, 2002).

[181]Complainants' Reh'g Request at 25.

[182]Complainants' Reh'g Request at 25-26, 33-34.

[183]June 26 Order at P 24.

Day Discovery Proceeding[184] (California, by its Attorney General, and Complainants CEOB and the CPUC participated in the discovery process and submitted evidence in that proceeding) in which we allowed parties to conduct broad discovery into market manipulation during the western power crisis of 2000 and 2001. Contrary to Complainants' and Snohomish's assertions,[185] Complainants had a full opportunity in the 100-Day Discovery Proceeding to conduct the discovery they complain they did not have an opportunity to discover here. We note that, while Complainants have only generally proffered the evidence submitted in that proceeding without pointing to or discussing any particular evidence for our consideration, in making our determination here we considered all of the evidence submitted in that proceeding.

101. After carefully considering all of the evidence submitted by Complainants in this proceeding, the Staff Report,[186] and the evidence submitted in the 100-Day Discovery Proceeding, we found that Complainants did not sustain their burden under the public interest standard to justify the modification of these contracts.

102. There also is no merit to Complainants' claim that the June 26 Order is inconsistent with the April 25 Order. Complainants argue that in the April 25 Order "the Commission asked whether expectations of future dysfunctional prices inflated forward expectations so that the spot market dysfunctions could be said to have adversely impacted forward market prices, invalidating those prices."[187] They contend that "[c]onfronted with such evidence now, the Commission draws the conclusion that such evidence somehow validates the unjust and unreasonable forward prices."[188]

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[184]San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Serv., 101 FERC ¶ 61,186 (2002).

[185]Complainant's Reh'g Request at 4, 34, 37, 61-62; Snohomish Reh'g Request at 37-38.

[186]Complainants assert that we erred in acting on their complaints before Commission Staff completes its investigation into alleged market power and withholding by sellers. We find otherwise. This complaint proceeding is separate from the staff investigation. Nothing has been presented to show that it is necessary to hold our decision regarding the instant complaints until the separate staff investigation is completed.

[187]Complainants' Reh'g Request at 27.

[188]Id.

Complainants' statement of our holding is incorrect. In the June 26 Order, we applied the public interest standard of review and found that Complainants did not meet their burden to justify modification of these contracts. Furthermore, in the June 26 Order, we explained that the causal effect of the spot market on forward bilateral prices would be relevant to contract modification only where the just and reasonable standard of review is applied.[189] Since the just and reasonable standard of review is not applicable here, that issue was not pertinent to our findings. Nothing in our determinations conflicts with our April 25 Order.

103. Complainants assert that, since they were wrongly prohibited from conducting any discovery concerning market manipulation and abuse, it is erroneous to exclude the evidence adduced in Docket Nos. EL01-10, IN01-3, EL02-113-000, EL02-114-000, EL02-115-000, EL02-80, EL02-81, EL02-82 and EL02-83 from the record in these proceedings. The Commission may reopen the record in its discretion where there is good cause.[190] The Commission views good cause as consisting of extraordinary circumstances, that is, a change in circumstances that is more than just material, but goes to the very heart of the case.[191] In deciding whether to exercise its discretion, "the Commission looks to whether or not the movant has demonstrated the existence of extraordinary circumstances that outweigh the need for finality in the administrative process."[192] As the Commission explained in Opinion No. 238, "we recognize of course that changes have occurred since the close of the record. But such changes always occur. Yet litigation must come to an end at some point. Hence the general rule is that the record once closed will not be reopened."[193]

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[189]June 26 Order at P 37.

[190]18 C.F.R. § 385.716 (2003).

[191]CMS Midland, Inc., 56 FERC ¶ 61,177 at 61,624, reh'g denied, 56 FERC ¶ 61,361 (1991).

[192]East Texas Electric Coop., Inc. v. Central and South West Serv., Inc., 94 FERC ¶ 61,218 at 61,801 (2001) (denying reopening of record where movant sought to use actual data which became available after the close of the record in place of hypothetical data used at hearing).

[193]Transwestern Pipeline Co., Opinion No. 238, 32 FERC ¶ 61,009 (1985), reh'g denied, Opinion No. 238-A, 36 FERC ¶ 61,175 at 61,453 (1986).

104. Contrary to Complainants' assertion, Complainants had a full opportunity in the 100-Day Discovery Proceeding to conduct the discovery into market manipulation during the western power crisis of 2000 and 2001 that they complain they did not have an opportunity to discover here. In the June 26 Order, the Commission found that the records of those other proceedings contain thousands of submittals, most of which are case-specific and not relevant to the issues in the instant proceeding and that the documents that could be relevant have been submitted in the 100-Day Discovery Proceeding.[194] The evidence that Complainants seek to introduce into the record will not change the outcome of this proceeding; therefore, we reject Complainants' argument.

The Commission orders:

(A) The Complainants' and Snohomish's requests for rehearing of the June 26 Order are hereby denied for the reasons stated in the body of this order.

(B) The Indicated Sellers' request for clarification of the June 26 Order is hereby granted in part and denied in part for the reasons stated in the body of this order.

(C) CARE's request for rehearing of the June 26 Order is hereby denied for the reasons stated in the body of this order.

(D) The Complainants' motion to dismiss the complainants in Docket Nos. EL02-60 and EL02-62 with prejudice as to El Paso is granted, as discussed in the body of this order.

By the Commission. Commissioner Massey dissenting with a separate statement attached.
Commissioner Brownell concurring with a separate statement attached.

(S E A L)

Linda Mitry,
Acting Secretary.

[194] June 26 Order at P 34.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utilities Commission of the State of California	Docket Nos. EL02-60-000, EL02-60-003 and EL02-60-004
v.	
Sellers of Long Term Contracts to the California Department of Water Resources	
California Electricity Oversight Board	
v.	Docket Nos. EL02-62-000 EL02-62-003 and EL02-62-004
Sellers of Energy and Capacity Under Long-Term Contracts with the California Department of Water Resources	(Consolidated)

(Issued November 10, 2003)

MASSEY, Commissioner, dissenting:

I dissented from the underlying order and nothing in today's order persuades me to change my mind. The public interest requires that the contracts at issue be reformed.

For the reasons stated in my dissent in the underlying order, I dissent from today's order.

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William L. Massey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utilities Commission of the
State of California
v.
Sellers of Long-Term Contracts to the
California Department of Water Resources

Docket Nos. EL02-60-000,
EL02-60-003 and EL02-60-004

California Electricity Oversight Board
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Long-Term Contracts With the
California Department of Water Resources

Docket Nos. EL02-62-000,
EL02-62-003 and EL02-62-004

(Consolidated)

(Issued November 10, 2003)

Nora Mead BROWNELL, Commissioner concurring:

1. I am writing separately to reiterate a concern I raised about the June 26 Order: the rationale for concluding that modification of the contracts is subject to the public interest standard of review. When these cases were set for hearing, I noted that existing judicial case law seemed to indicate that the public interest standard applied to all of these contracts based solely on the contracts' failure to explicitly reserve the buyer's right to seek unilateral changes under Section 206.[195] Nevertheless, I was willing to set the issue for hearing so that the parties and the ALJ could have an opportunity to further explore whether my understanding of the case law was accurate. Three ALJs have now independently come to the same conclusion: judicial case law establishes that in the absence of clear contractual language allowing unilateral contract modification, the party seeking the change must meet the public interest standard.[196]

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[195] Public Utilities Commission of the State of California v. Sellers of Long-Term Contracts to the California Department of Water Resources, et al., 99 FERC & 61,087 (2002) (citing Texaco Inc. v. FERC, 148 F.3d 1091, 1096 (D.C. Cir. 1998) and Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000)).

[196] Public Utilities Commission of the State of California v. Sellers of Long-Term Contracts to the California Department of Water Resources, et al., 102 FERC & 63,013 at

(continued…)

2. This order could have simply affirmed the ALJ's conclusion on this point and ended there the analysis of which standard to apply. That is what I am voting to do. Unfortunately, today's order fails to do so and instead bases the finding of the applicable standard on an analysis of the extrinsic evidence that parties did or did not present at hearing. By doing so, the order ignores the law. The Mobile-Sierra doctrine is not an invention of the FERC that we are free to mold as we wish; it is a directive from the Supreme Court. Moreover, the order misses an opportunity to provide clarity and certainty to all market participants and leaves open the possibility that the Commission may order unnecessary fact-finding on the parties' intent in future contract abrogation cases.

Nora Mead Brownell

P 28 (2003); Nevada Power Company and Sierra Pacific Power Company v. Duke Energy Trading and Marketing, L.L.C., et al., 101 FERC & 63,031 at P 27 (2002); and PacifiCorp v. Reliant Energy Services, Inc., et al., 102 FERC & 63,030 at P 18 (2003).